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THE TRADE COMMISSION ACT¹

On January 20, 1914, at a joint session of both Houses of Congress, President Wilson read his long-awaited message upon the subject of trust legislation. The views therein expressed forecast admirably the character of the measures which were to constitute the anti-trust program of the present administration. The drafts of five tentative bills designed to effect the reforms suggested by the President were made public almost immediately afterwards. These bills provided:

(1) For the creation of an Interstate Trade Commission of five members with investigatory powers into the organization and operation of corporations engaged in interstate commerce, excepting carriers. The commission was also empowered to act as an advisory board: to the Attorney General, in terminating by agreement or by suit unlawful conduct or conditions; and to the courts, when these at discretion referred to it any aspect of a litigation or any proposed decree. In addition it was given the function of assisting the government in preventing violations of the Sherman act by submitting information in regard thereto to the Attorney General.

(2) For the prohibition of interlocking directorates in interstate corporations, railroads, and banks and trust companies which are members of a reserve bank.

(3) For a definition and explanation of various terms and expressions used in the Sherman anti-trust act.

(4) For amending the Sherman act by declaring (a) that both local price cutting with the intent of destroying competition and exclusive purchasing and selling arrangements were to be regarded as attempts to monopolize.

(b) That a decree obtained by the government should be conclusive evidence of the same facts and issues of law in favor of any other party in any other proceeding brought under the provisions of the act.

(c) For injunctive relief against threatened loss or damage by reason of a violation of the act.

(5) For giving to the Interstate Commerce Commission the power to regulate the issuance of railway securities.²

The Trade Commission bill (H.R. 12120) was the only one to be introduced into Congress at this particular time. This measure was modeled along the lines of what was commonly known as the Newlands bill introduced into the Senate several months previously. Although containing several amendments and additions it pre-

¹ This is the first of two articles on recent trust legislation. The second, to be published in the March number, will be devoted to the Clayton act.

² Cf. H.R. 12120, and Committee Prints 1, 2, 3, 4, tentative bills, and *Financial Chronicle*, vol. 98, p. 273 ff.

served the essential features of the earlier measure.³ The new bill was introduced in the House by Representative Clayton and referred to the Committee on Interstate Commerce. Simultaneously it was also introduced in the Senate by Senator Newlands as S. 4160.⁴

A few days after the tentative bills were made public,⁵ hearings upon them were begun. Representative Adamson's Committee on Interstate and Foreign Commerce took charge of the Interstate Trade Commission and Railroad Securities measures. Representative Clayton's Committee on the Judiciary assumed control of the three remaining bills. The two series of hearings continued for some weeks.⁶

³ Cf. statements of Representative Clayton and Senator Newlands to the press, quoted in *Cong. Rec.*, vol. 51, p. 2,203.

⁴ *Ibid.*, pp. 2,203, 2,212, 2,341.

⁵ Tentative bill no. 4 prohibiting intercorporate stockholding does not appear to have been made public along with the other bills at this time.

⁶ The course of the Railroad Securities bill it is not necessary to trace. This measure, after having undergone several changes, finally passed the House and was referred to the Senate Committee on Interstate Commerce, from which it was reported back with amendments by Senator Newlands on July 23. Some pressure, however, had been brought to bear in part because of the European war, and early in September it was announced that in view of the disturbed conditions created by this event the President had consented to the postponement of the securities measure for at least the session (Cf. *New York Times*, September, 3, and *Chronicle*, vol. 99, p. 647).

The legislative history of the Trade Commission bill is summarized as follows:

On March 14 a newly drafted bill for the creation of an Interstate Trade Commission (H.R. 14631) was introduced into the House by Representative J. Harry Covington of Maryland and was referred to the Committee on Interstate and Foreign Commerce (*Cong. Rec.*, vol. 51, p. 5,218). This bill was reported to embody the ideas of President Wilson (*Chronicle*, vol. 98, p. 878) and represented the unanimous views of a subcommittee (Covington, Sims, Rayburn, Montague, Talcott, Stevens of Minnesota, Esch, and Knowland) of the House Interstate Commerce Committee, which had been appointed by Chairman William C. Adamson on February 16. Representative Covington was chairman of this subcommittee. One month later this gentleman introduced a revised draft (H.R. 15613) of his bill of March 14 (H.R. 14631, *Cong. Rec.*, vol. 51, p. 7,178). On the succeeding day, April 14, this bill was reported with amendment by Mr. Covington accompanied by a report (H. Rept. No. 533, 63 Cong., 2 Sess.). The bill and report were then referred to the Committee of the Whole House on the state of the Union (*Cong. Rec.*, vol. 51, p. 7,244). The revised bill differed but little from the Covington measure introduced one month previously. The principal change was contained in an amending clause providing that in any equity suit brought at the instance of

the Attorney General under the anti-trust acts the court might, on conclusion of the testimony, refer the suit to the Trade Commission to ascertain and report an appropriate form of decree, and that upon such report exceptions might be filed. The court might then adopt or reject the report thus presented either in whole or in part.

On June 5, in practically unchanged form, the Interstate Trade Commission bill (H.R. 15613) passed the House by a *vive voce* vote after a motion by Representative Murdock to recommit had been lost by a vote of 151 to 19 (*Cong. Rec.*, vol. 51, pp. 10,743-10,745). As earlier indicated, the original Trade Commission bill, known in the House as H.R. 12120, was also introduced in the Senate by Senator Newlands (S. 4160). This measure was referred to the Senate Committee on Interstate Commerce (p. 2,341). On June 6 this bill was reported back by Senator Newlands so amended as to constitute really a substitute measure (pp. 10,771-72). The bill was accompanied by a report (No. 583) thereon. The same day the Senate received the House Interstate Trade Commission bill (H.R. 15613) which measure was also referred to the Senate Committee on Interstate Commerce (p. 10,770). A week later Senator Newlands reported back this bill and submitted a report (No. 597). His committee had so amended the measure originally passed by the House on June 5, that to all practical intents and purposes the amended Senate Trade Commission bill (S. 4160) was substituted for it. An important amendment, however, not appearing in the amended bill (S. 4160), was added by the Senate committee in giving to the Trade Commission jurisdiction over unfair competition (Sec. 5, H.R. 15613, reported by Mr. Newlands with amendments, June 13, 1914. *Cf.* also Senator Newlands' remarks, *Cong. Rec.*, vol. 51, p. 11,274). On June 20 Senator Newlands moved that the Senate Trade Commission bill (S. 4160) be stricken from the calendar and that H.R. 15613 be substituted for it (p. 11,726). This was agreed to.

After a rather protracted debate in the Senate, largely concerning the matter of unfair competition, a unanimous consent was reached that a vote on the Trade Commission bill should be taken not later than 6 p. m. on August 5 (p. 14,461). On that day, after some debate and the rejection of several amendments, H.R. 15613 as amended by the Senate passed by a vote of 53 to 16, 27 not voting (p. 14,497). Two days later the House by unanimous consent disagreed to H.R. 15613 as amended, and asked for a conference (p. 14,618). In the Senate Mr. Newlands on the same day moved that the Senate agree to the conference, the Senate conferees to be named by the Chair. The motion was agreed to and the Vice-President appointed Senators Newlands, Pomerene, Saulsbury, Clapp, and Cummins (p. 14,612). For the House the Speaker named Messrs. Adamson, Sims, Covington, Stevens (Minn.), and Esch (p. 14,618). The bill remained in the hands of this conference committee for about a month until the conference succeeded in drafting a measure embodying the essential features of both the House and Senate proposals. On September 4 Mr. Adamson in the House and Mr. Newlands in the Senate presented the conference report, including the draft of the bill in its final form (pp. 16,081, 16,124). On September 8 the Senate, by a vote of 43 to 5, agreed to the conference report, and two days later the House also accepted it (pp. 16,181, 16,325). The measure was presented to the President on September 15 (p. 16,582) and was signed by him on September 26.

Character and constitution of the commission. As passed and signed by the President, the Federal Trade Commission bill provides for a commission of five members, not more than three of whom shall be members of the same political party. The terms of the first commissioners are three, four, five, six, and seven years respectively. Each of their successors is appointed for seven years except that a person selected to fill the unexpired term of a commissioner is appointed only for the balance of that term. The salaries of the commissioners are \$10,000 and a secretary is provided for at a salary of \$5,000.⁷

With the organization of the commission, the bill provides that the Bureau of Corporations shall cease to exist, together with the offices of commissioner and deputy commissioner. All pending investigations of the bureau are to be continued by the commission, to which all employees are transferred. The bureau's records also become the property of the commission and unexpended funds become available for its use.⁸

*Powers of the Commission.*⁹ These may be summarized as follows:

- (1) Power to effect a readjustment of business and prescribe appropriate decrees in equity suits;
- (2) Power of investigation;
- (3) Power to require reports and classify corporations;
- (4) Power over unfair competition.

(1) As originally passed by the House on June 5, the Trade Commission bill provided for an investigatory tribunal with little or no power beyond that which is the necessary accompaniment of investigation. This fact also remains true in large measure of both the amended bill as passed by the Senate and of the bill finally adopted in conference passed by both houses and signed by the President. If either measure be stripped of the section relating to unfair competition little remains but provision for an investigatory body. In addition to its function of investigation,

⁷ Secs. 1 and 2 H. R. 15613, as amended in conference. References in the discussion of the Trade Commission, except where otherwise indicated, refer to this measure.

⁸ Sec. 3.

⁹ By the terms of the Clayton bill the commission is given certain other powers besides those mentioned in the measure creating it. It has been deemed best, however to consider these in connection with the Clayton bill rather than under the discussion of the Trade Commission bill. But one should not arrive at a final conclusion with regard to the powers of the Trade Commission without considering the authority bestowed upon it under the Clayton bill.

of which more later, the new law does provide, however, that *upon the application of the Attorney General* the commission may "investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the anti-trust acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law."¹⁰ The power of the commission to make these recommendations, therefore, depends upon the application of the Attorney General. That official is not bound to ask the commission for these recommendations nor, furthermore, is there apparently anything in the act which binds him to the acceptance of such recommendations when once they have been made.¹¹ While it was probably the intention of Congress that the Attorney General should rely upon the commission for recommendations and that he should adopt such as are made, even a casual critic of the bill will wonder why the law did not make it obligatory upon that officer to do both. Certainly it is only reasonable to suppose that the commission will be much better equipped than the Attorney General to devise an economically satisfactory adjustment. Why then make this function in any way dependent upon the latter?

The new bill also provides that "in any suit in equity brought by or under the direction of the Attorney General . . . the court *may* . . . if it shall be then of opinion that the complainant is entitled to relief, refer said suit to the commission, as a master in chancery, to ascertain and report an appropriate form of decree therein."¹² But, it is not necessary that the courts should do this and the court "may adopt or reject such report, in whole or in part, and enter such decree as the nature of the case may in its judgment require."¹³

Again, it was probably the intention of Congress that the courts should consult the commission in the matter of decrees. Furthermore, it is extremely probable that they will do so. Yet it remains discretionary with them. They need not do so unless they wish. Would not the law have been improved by providing that in each case the courts *must* submit the suit to the commission as a master in chancery to report an appropriate form of decree? Under our theory of separation of powers the courts

¹⁰ Sec. 6(e).

¹¹ Obviously the discretion of the Attorney General is subject to the instructions of the President.

¹² Sec. 7. Italics are the writer's.

¹³ *Ibid.*

could not be required to adopt the conclusions thus arrived at. On the other hand, the requirement that the court must submit the case to the commission and receive from it a report of an appropriate form of decree would appear to the writer to be procedural in character and therefore constitutional. Certainly it is as yet by no means settled law that such an arrangement would be unconstitutional.

Since they are in no way mandatory upon either the Attorney General or the courts the two provisions under discussion can be of advantage only through the fact that either or both the Attorney General and the courts elect to call upon the commission for assistance. Assuming, as it is probably reasonable to do, that both pursue such a course, it is necessary to point out that there is still room for one to question whether any positive advantage has been secured by the power conferred upon the commission by these two clauses. It should not be forgotten that in the Bureau of Corporations the Department of Justice has had in the past an agent capable of performing such functions when called upon. While this service was *extra*-official in character, the fact remains that the bureau rendered it at least once during Mr. Wickersham's incumbency and that, to quote his language regarding the services of the bureau in the Tobacco dissolution, "the report of its principal expert was largely relied upon . . . in accepting as economically satisfactory the distribution of businesses under the plan."¹⁴ Furthermore, the functions of the Bureau of Corporations in these matters, as also suggested in Mr. Wickersham's report might easily have been extended, thus securing the desired results without creating any Trade Commission.

At the same time, one should not underestimate the importance of these two powers which have been conferred upon the commission. The Bureau of Corporations was not specifically authorized to assist either the Attorney General or the courts. The commission is. Moreover, much more weight will attach to the conclusions of such a body than could possibly attach to those of the bureau. If the commission is composed, as it is hoped that it will be, of men thoroughly familiar with economic conditions and affairs, it is more than likely that its functions of assisting the Attorney General and the courts will have valuable results. This effect is contingent upon the assumption that the Attorney General and the courts make use of the commission.

¹⁴ *Report of Attorney General*, 1911, p. 7.

(2) Aside from the power of investigation which is conferred upon the commission as incidental to the functions just discussed, that body is given several other inquisitorial powers. The commission has power:

A. To gather and compile information concerning, and to investigate from time to time the organization, etc. of any corporation engaged in commerce, excepting banks and common carriers subject to the act to regulate commerce, and its relation to other corporations and to individuals, etc.¹⁵

The act of February 14, 1903, creating the Bureau of Corporations provided that the commissioner should have the "power and authority to make . . . diligent investigation into the organization, conduct, and management of the business of any corporation, joint-stock company, or corporate combination engaged in commerce among the several states and with foreign nations, excepting common carriers."¹⁶ Aside from the fact that the new act excepts banks in addition to common carriers, the investigatory provision of the new law is substantially the same as that of the previous law. It is therefore difficult to arrive at any other conclusion than that this provision of the new law merely transfers to the new Trade Commission powers formerly exercised by the old Bureau of Corporations. This view is supported by the conference report on the measure.¹⁷

B. Upon the direction of the President or either house of Congress to investigate and report the facts relating to any alleged violation of the anti-trust acts by any corporation.¹⁸

As is well known, the Department of Justice maintains a bureau of investigation. This bureau, as its name implies, is concerned with the investigation of violations of the laws of the United States, among them the anti-trust laws. How large a force of men from this bureau have been employed in the investigation of violations of these latter acts is not a matter of public record. That a considerable number have been so used is indicated by the number of complaints investigated. During the year 1912, the final year of Mr. Wickersham's incumbency, the agents of the department participated in a monthly average of more than 41 investigations of anti-trust complaints. Nor does this total greatly exceed the record for the year 1913 under Mr. Mc-

¹⁵ Sec. 6 (a).

¹⁶ 32 Stat. L. 825, 827.

¹⁷ H. Rept. No. 1142, 63 Cong., 2 Sess., p. 18.

¹⁸ Sec. 6 (d).

Reynolds, during which time the monthly average of complaints investigated was more than 36.¹⁹ During the year 1913, the amount spent by the bureau of investigation of the Department of Justice upon trust investigations was exceeded only by the amount spent upon the investigation of white slave cases and was practically double that spent for any other purpose except the latter. Clearly, then, the function of investigating and reporting "the facts relating to any alleged violation of the anti-trust acts by any corporation" has been exercised for some time past with great thoroughness by the Department of Justice.

Probably the provision of the law which is now under discussion will ultimately result in the Trade Commission exercising the same authority over violations of the anti-trust acts as the Commerce Commission exercises over violations of the commerce act; that is, the investigatory work will be handled entirely by the commission and the prosecution of offenders will be left to the Department of Justice. This apparently was the intention of this particular subdivision and it may, I think, be assumed that the bureau of investigation of the Department of Justice will cease its activities so far as violations of the anti-trust acts are concerned, either through administrative order or because appropriations are cut off by Congress. If such is the result there is room for the contention that the effect of this clause is merely to transfer to the new commission a function formerly exercised by the Department of Justice.

C. Whenever a final decree has been entered against any defendant corporation in any suit brought by the United States to prevent and restrain any violation of the anti-trust acts, to make investigation upon its own initiative, of the manner in which the decree has been or is being carried out, and upon the application of the Attorney General it shall be its duty to make such investigation.²⁰

Does this provision secure any new advantage to the public? It has been frequently reported that the Department of Justice has undertaken a widespread inquiry into the tobacco business in order to arrive at a determination of the effectiveness of the plan of the Tobacco dissolution. If this report is correct, it would seem that this function with which the Trade Commission has been endowed has likewise been exercised by some other authority. Even if not correct it still remains true that such an investigation could have been prosecuted at any time by the Department of Justice

¹⁹ *Report of the Attorney General*, 1912, 47; 1913, 45.

²⁰ Sec. 6 (c).

through its bureau of investigation and without the creation of a Trade Commission.

D. To investigate from time to time trade conditions in and with foreign countries where associations, combinations, or practices of manufacturers, merchants, or traders, or other conditions, may affect the foreign trade of the United States. . . .²¹

Here is a power apparently not previously exercised. It clearly increases the investigatory authority of the commission beyond that previously exercised by either or both the Bureau of Corporations and Department of Justice.

The powers of the commission in investigation are still further broadened by the provision:

E. That for the purposes of this act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation.²²

Reference to the act creating the Bureau of Corporations shows that it also had "the right to subpoena and to compel the attendance and testimony of witnesses and the production of documentary evidence."²³ But the provision of the new law gives the commission much broader powers than the similar provision gave to the bureau. This is because the powers of the commission are *in toto* much greater than were the powers of the commissioner of corporations, and the section of the new law under discussion applies to the exercise of any and all of them.

In endeavoring to estimate justly the worth of this power it would therefore be a mistake to regard it as merely the successor to powers formerly exercised by the Department of Justice and the Bureau of Corporations. While this appears to be true in some respects, the inquisitorial authority of the commission is, on the whole, much broader and all embracing. Again, the value of the investigations of the commission and of the recommendations which it is empowered to make ought to be much greater than those of either or both the Department of Justice and the Bureau of Corporations. It may be assumed the commission will devote a great deal of its time to this work, and that it will have a larger

²¹ Sec. 6 (h).

²² Sec. 9.

²³ 32 Stat. L. 825, 827.

force of investigators than both the bureau and the department combined. These facts coupled with the commission's broader powers should result in much more thorough investigations and in much sounder conclusions than have resulted in the past from the investigatory work of the Department of Justice and the Bureau of Corporations.

(3) The commission has the power:

To require . . . corporations engaged in commerce, excepting banks, and common carriers . . . or any class of them, or any of them . . . to file with the commission *in such form as the commission may prescribe*²⁴ annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization . . . and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing.²⁵ From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this act.²⁶

The House bill, passed June 5, contained a provision requiring annual reports to the commission from corporations with more than \$5,000,000 capital; also from corporations with a less capital but belonging to a class which the commission might designate. It also gave the commission power to prescribe "as near as may be a uniform system of annual reports."²⁷ The conference substitute for the provisions of the House bill seems to have been a wise change, if for no other reason than because of the very large number of corporations with more than \$5,000,000 capital. Inasmuch as many of these are not organizations that may be regarded as monopolies or as being in restraint of trade, it is doubtful if the House provision would have effected any result not obtainable through the discretionary power now vested in the commission under conference bill of requiring annual or special reports in such form as it may prescribe. The provision of the new law in regard to reports will be of value to the commission in the exercise of its various other functions, especially those of investigation and recommendation.

The power of classifying corporations is apparently intended to supplement that given of requiring from corporations or any class of them annual or special reports in such form as the commission may prescribe. The effect of these two subsections combined is

²⁴ Italics are the writer's.

²⁵ Sec. 6 (b).

²⁶ Sec. 6 (g).

²⁷ Sec. 9, H. R. 15613, June 5, 1914.

apparently to give the commission the power in its discretion to make a classification of corporations, and then, if it deem it fitting, to prescribe a uniform system of accounting for the reports of all members of each class. This situation may be of tremendous and far-reaching importance in arriving at a solution of the trust problem. As has been pointed out elsewhere,²⁸ there are no facts available at the present time which enable one to arrive at a determination of the question of whether great combinations and monopolies or independent competing organizations are the more efficient. These two clauses of the new law will make possible a determination of this character if the commission chooses to attempt it. Having designated as a class certain industries, in each of which both a large trust and one or more independent competitors exist, such uniform reports may be required from all organizations of the class as will make it possible to determine, upon a basis of production and selling costs, which type is the more efficient. If combination and monopoly is superior, we can then accept this principle and regulate organizations of this type so as to insure that the public will receive the benefits of their superior efficiency. If competition is the more efficient, we can continue the policy of "trust busting" with the thorough assurance that to do so is economically desirable.

(4) Perhaps the most important power of the Trade Commission and the one most likely to make this body an important administrative authority, is that over unfair competition. After declaring unfair methods of competition to be unlawful the new law declares that:

The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the acts to regulate commerce, from using unfair methods of competition in commerce.²⁹

The means provided for effecting this result may be summarized somewhat as follows:

When the commission believes that an organization is utilizing an unfair method of competition and it appears to it that a proceeding in this respect would be in the interests of the public, the commission issues and serves a complaint stating the charges and giving notice of a hearing at least thirty days after service. The party complained against has the right to appear and show cause why an order should not be entered requiring him to desist from

²⁸ Stevens, "Unfair Competition," *Political Science Quarterly*, vol. XXIX (June and September, 1914), pp. 282, 460.

²⁹ Sec. 5.

the violation of law charged in the complaint. Any party, upon good cause being shown, may be allowed by the commission to intervene and appear.

If upon hearing, the commission believes the method of competition in question to be prohibited, it makes a report in writing stating its findings as to the facts and issues an order to the party complained against ordering him to cease the use of the method in question. The commission may modify or set aside its report or order at any time prior to the filing of the transcript of the record of the hearing with the Circuit Court of Appeals.

In order to enforce the order of the commission it is provided that, if it is not obeyed, the commission may apply to the Circuit Court of Appeals of any circuit where the method in question was used, or the party resides or carries on business, filing the transcript of the record of the proceeding, including testimony. The court then takes jurisdiction, notifies the party, and has full power to enter a decree affirming, modifying, or setting aside the order of the commission. The findings of the commission as to the facts, however, are conclusive if supported by testimony. If either party applies to the court for leave to adduce additional evidence and can show that it is material and that there were good reasons why it was not introduced before the commission, then the court may direct that such additional evidence be taken before the commission. This body may then modify its findings or make new ones, and again file the results with the court (which findings are deemed conclusive if supported by testimony), together with the additional evidence with its recommendations, if any, for the modification or setting aside of its original order. The judgment and decree of the Circuit Court of Appeals is made final, except that the Supreme Court may review upon *certiorari*. The jurisdiction of the Circuit Court of Appeals to enforce, modify, or set aside the orders of the commission is made exclusive and all such proceedings are given precedence over other cases and are required to be expedited in every way. The order of the commission or the judgment of the court to enforce the same cannot absolve any one from liability under the anti-trust acts. Any party against whom an order of the commission is made may obtain a review upon an application for the order to be set aside to the Circuit Court of Appeals.³⁰

To what extent does the power given to the Trade Commission to prevent unfair methods of competition, and the mechanism pro-

³⁰ Sec. 5.

vided to secure this end, alter the situation from that which has prevailed in the past? In the first place, it may be forcibly contended that all unfair methods of competition fall within the scope of either restraint of trade or monopoly sections of the Sherman act, a contention which finds support in the numerous decrees that have been handed down enjoining practices and methods which must be regarded as unfair.³¹

From this point of view, neither a trade commission nor the authority given it to make orders against such practices was necessary, since the courts were exercising this function under the Sherman act. The new law, therefore, has merely conferred upon the commission the quasi-judicial function of passing upon the fair or unfair character of a given method—a determination formerly made judicially by the courts in passing upon questions of restraint of trade and monopoly.

At the same time, it must not be forgotten that the Sherman law refers to contracts, combinations, and conspiracies in restraint of trade, to monopolization, attempts to monopolize, and combinations and conspiracies to monopolize. Although these clauses would appear broad enough to cover all methods of unfair competition, might it not be true of prevention solely by the courts under the Sherman act that numerous cases of economically unfair methods would be construed, as in *United States v. Nelson*,³² as not violative thereof? True, a court, the Circuit Court of Appeals, may by its decree alter or modify the order of the commission, but only if the commission applies for enforcement, or if application for a review is made by the party against whom the order is directed. Orders of the commission will not come before the court, therefore, either when they are obeyed or when no application for a review is made. One or the other of these two situations is likely to exist in many cases. Moreover, it may reasonably be expected that the Circuit Courts of Appeals will tend from the outset to rely upon the views of the commission and support its orders. The new law provides a body of men with wide investigating powers, who are, impliedly at least, to devote considerable attention to the study of unfair methods of competition. These five men ought, therefore, to become specialists in this subject. If so, their orders will be based upon economic rather than legal grounds. They ought, in consequence, to be more sound, on the

³¹ Cf. decrees against American Thread, Burroughs Adding Machine, General Electric and American Coal Products companies, Eastern States Retail Lumber Dealers, Southern Wholesale Grocers Associations, and others.

³² 52 Fed. 646.

whole, than have been the decisions of the courts in the past relating to this matter or than would be those decisions if the prevention of unfair methods had been entrusted to the courts alone. Unless the Circuit Courts of Appeals show a tendency to refuse to accept the guidance of the commission, the arrangements of the new law are likely to prove much more effective in eliminating unfair methods than the previous system whereby under the authority of the Sherman act occasional orders were issued against such practices by the court. Furthermore, they should, I think, be regarded as superior to leaving the matter of prevention solely in the hands of the courts.

The new law provides a simple and expeditious method of procedure. It is not necessary that the commission shall make an investigation before ordering a hearing. Instead, it may do this whenever it "shall have reason to believe" that a party has been using an unfair method, "and if it shall appear to the commission that a proceeding by it . . . would be to the interest of the public."³³ The findings of the commission are final as to the facts if supported by testimony. If the order of the commission is not obeyed, the case goes directly to the Circuit Court of Appeals whose jurisdiction over the orders of the commission is exclusive, and whose judgment and decree is final, except that it is subject to *certiorari*. Further, in the Circuit Court of Appeals these cases take precedence over all other pending cases and are required to be expedited in every way.

Another point in the unfair competition section deserves comment. When an application is made to introduce new evidence before the Circuit Court of Appeals the court *may* order it to be taken before the commission, which body may alter its findings or make new ones. This ought to result, if the courts commonly do this, in the commission being upheld in a larger proportion of cases than it otherwise would. This should tend to increase the dignity and the prestige of the commission.

³³ The last clause beginning with "and" apparently constitutes a limitation upon the power of the commission. If too narrowly interpreted its introduction into the bill would seem unfortunate. The clause implies that a method should not be the subject of the orders of the commission unless of interest to the public. If the commission is broad-minded enough to see that the use of every unfair method is of public interest through the fact that over perhaps a very long period of time the ultimate consequences and results of its employment will be to eliminate efficient competitors or shut out prospectively efficient ones, then this clause is of no moment. If, on the other hand, the commission concerns itself only with the immediate consequences of a given act unfortunate results may occur.

One is therefore led to inquire why it was not made mandatory upon the Circuit Court of Appeals to refer the new evidence to the commission instead of providing that this reference should be discretionary. Little or nothing would have been lost thereby, and the commission would probably have been assured a somewhat greater importance.

On the whole, I think, it must be concluded that the power over unfair methods of competition which has been given to the Trade Commission is an important step in the direction of eliminating those practices and therefore toward the ultimate solution of the trust problem.

Enforcement of the law. A serious question which must always arise in any analysis of a law is the method of enforcement. The mechanism provided for the enforcement of the unfair competition section has already been outlined. If the order of the commission is not obeyed that body may apply to the Circuit Court of Appeals, which may affirm or modify the order of the commission. The compliance of an organization with the decree entered by the court is to be obtained through the fact that if it is not obeyed contempt proceedings may be instituted. In other words, in the last analysis the enforcement of the orders of the commission relative to unfair competition rests upon injunctions and the customary legal procedure that follows failure to obey them. Is this sufficient to secure the desired result?

Elsewhere the writer has endeavored to indicate that if it were possible to prevent or eliminate unfair competition we should have taken a long step on the road to the solution of the so-called trust problem. Regarding the suppression of unfair competitive methods as fundamental, the writer, in the article just cited, was inclined to favor imprisonment as the sole punishment for such offences. This view was induced partly by the comparatively light punishments for violations of the Sherman act,³⁴ partly by the

³⁴ The following is a table showing the small fines that have been the sole punishment in certain cases of restraint of trade under the Sherman act, where convictions under the criminal clause have been secured. It should be borne in mind that these total fines are usually distributed among several individuals thus making the sum paid by each a really insignificant matter:

<i>U. S. v. Simmons</i> (1903)	\$265
<i>U. S. v. National Umbrella Frame Co.</i> (1907).....	3,000
<i>U. S. v. Santa Rita Mining & Store Cos.</i> (1907).....	2,000
<i>U. S. v. Federal Salt Co.</i> (1903).....	1,000
<i>U. S. v. F. A. Amsden Lumber Co.</i> (1906).....	2,000
<i>U. S. v. Imperial Window Glass Co.</i> (1910).....	10,000

fact that injunctions in proceedings under the Sherman act have not always been obeyed,³⁵ and partly by the belief that adequate enforcement of any law can be secured only when individuals have a wholesome fear of a punishment which will follow its violation.³⁶

It may well be, however, as has been pointed out to the writer, that public sentiment is not yet ripe for this step and that the result of any such provision would be to render such a law nugatory for the reason that no jury would convict knowing that a prison sentence would be inevitable as a result. On the other hand, it should not be forgotten that subject to no worse penalties than are provided in the Sherman act (penalties which have not proved extraordinarily effective in the past), a concern may use all the unfair methods which it chooses until the commission intervenes. Further, it may even then continue to use them until the court has handed down its decree.

The new law also prescribes necessary penalties in the form of fines or imprisonment or both for neglect or refusal to testify or produce documentary evidence in obedience to a subpoena; for wilful false entries in reports; and for wilful removal out of the jurisdiction of the United States or wilful mutilation of documentary evidence. Failure to file reports thirty days after notice of a default is punishable by a fine of \$100 per day.

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³⁵ Cf. in this connection contempt proceedings against the Southern Wholesale Grocers Association for violating the injunction of the court against classification. This practice the court held to be within the scope of the Sherman act. As bearing upon enforcement, it is worth noting that the contempt proceeding resulted in the imposition of a total fine of \$5,500. As this was divided among three persons it was certainly far from a drastic punishment. May it not be that as long as the profits of violating the anti-trust acts exceed the amount of fines imposed the violations will continue whether those fines are the result of criminal suits or of contempt proceedings for disobedience to decrees?

³⁶ See testimony of Mr. Kohler as to his conference with Messrs. Ahrens, Clifford, and Torrance with reference to Kohler's joining the Bathtub combination. This testimony is to the effect that Clifford stated that all the government could do was to break up the show. *The United States v. Standard Sanitary Manufacturing Co. and others*, Record U. S. C. C. for the District of Maryland, vol. I, p. 256.